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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

RICHARD CARL EBERHARDT,
JERRY EBERHARDT and RICHARD A. WARD,
*Petitioners,*

v.

STATE OF MARYLAND,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

The petitioners RICHARD CARL EBERHARDT, JERRY EBERHARDT, and RICHARD WARD, pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of Maryland rendered in these proceedings on February 5, 1973.

## OPINIONS BELOW

The opinion of the Court of Special Appeals, as yet unreported, appears at Appendix A, page A1. The Court of Appeals of Maryland denied the petitioners' petition for a writ of certiorari. A copy of this Order appears at Appendix B, Page A15.

## JURISDICTION

The order of the Court of Appeals of the State of Maryland was entered on February 5, 1973, See Appendix B. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

## QUESTION PRESENTED

Whether the State in a criminal prosecution can use in rebuttal evidence testimony concerning a Defendant's alleged involvement in prior criminal activities wherein the Defendant had previously been charged but not convicted.

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V

> "No person shall . . . be deprived of life, liberty or property,without due process of law . . . "

Constitution of the United States, Amendment XIV

> " . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . . "

## STATEMENT OF FACTS

A jury in the Criminal Court of Baltimore City convicted the Petitioner Richard Carl Eberhardt of pandering, Maryland Annotated Code, Art. 27, Sec. 15(a), Petitioner Jerry Eberhardt of conspiring to violate the Alcoholic Beverage Law, Maryland Annotated Code, Article 2B, Sections 3, 111, and 159 and Petitioner Richard A. Ward of occupying a disorderly house, Maryland Annotated Code, Article 27, Section 15(b). The Court imposed consecutive sentences of ten years and one year, respectively on Petitioner Richard Carl Eberhardt, two years on Petitioner Jerry Eberhardt, and one year on Petitioner Richard A. Ward.

Petitioners were arrested as a result of a raid by the Baltimore City Police on the premises of 621 Ensor Street, Baltimore, Maryland known as Hector's Restaurant.

Testimony of several police officers averred that a raid was conducted on May 5, 1971, pursuant to solicitation of an undercover policeman for purposes of prostitution (T. 81, 84, 88-91).[1] The raid of the premises resulted in the recovery of evidence of liquor license violations (T. 150-153). Police testimony linked Petitioners Richard Carl Eberhardt and Jerry Eberhardt with the alleged solicitation for prostitution which precipitated the raid (T. 88-91) and implicated the Petitioners with illegally having liquor on the premises (T. 183-184). Evidence presented by the State indicated that the Petitioner Richard A. Ward was the licensee of the premises (T. 195-196).

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[1] The transcript, which we are lodging with the Clerk, consists of three volumes which are consecutively paginated.

Petitioner Richard Carl Eberhardt testified that the police harassed him in the operation of his business (T. 414, 419), partly because of his refusal to allow undercover police agents on the premises (T. 410). Petitioner also denied the testimony presented by police officers during the State's case (T. 425, 433, 439).

On cross-examination, the prosecuter propounded questions to Petitioner Richard Carl Eberhardt, over objection of defense counsel, concerning solicitation for prostitution of police undercover agents in January of 1969 (T. 536), violations of the liquor laws during the same period (T. 536), and sales of liquor to undercover police agents in October and November, 1971, (T. 584). Under cross-examination, Petitioner denied having liquor on the premises before or after May 5, 1971, (T. 561) and he testified that he never knowingly allowed prostitution on his premises before, on, or after May 5, 1971, (T. 567, 582-583).

As rebuttal, the State, over objection, presented the testimony of four police officers that liquor had been offered and served to them at Hector's Restaurant (T. 635, 637, 662-664, 700). Their testimony further alleged that they had been solicited for purposes of prostitution at the restaurant (T. 630, 673, 678-9, 704). One of the officers testified that he had been solicited for purposes of illegal gambling (T. 672). The alleged misconduct involved the Petitioner Richard Carl Eberhardt and allegedly occurred before and after May 5, 1971. As a result of undercover police activity regarding these alleged incidents of misconduct, there were three series of arrests, two of which were nol prossed by the State and the other of which was never brought to trial (T. 632, 642, 691).

The Court allowed the State to present this rebuttal testimony on the theory that that rebuttal as to police harassment was the cause of Petitioners' arrests (T. 669).

The Court of Special Appeals of Maryland, ruled (Appendix A. P. 4) that the Petitioners had "opened the door" when Petitioner Richard Carl Eberhardt testified about police harassment and therefore, the State could contradict this claim on rebuttal. On February 5, 1973, the Court of Appeals of Maryland denied Certiorari.

## REASONS FOR GRANTING THE WRIT

1. The State of Maryland by presenting rebuttal testimony concerning the Petitioner Richard Carl Eberhardt's prior alleged criminal activities not resulting in convictions denied the Petitioners a fair and impartial trial.

2. Although this is a State criminal case, the federal circuits are in conflict on the question of the use of rebuttal testimony of a defendant's prior alleged criminal activities not resulting in a conviction. By granting certiorari in this case, this Court could decide this crucial issue for the federal courts as well as the State courts.

While this case is important to the petitioners in that they will have to serve terms of incarceration, there are matters involved which are more important. First of all is the protection of all criminal defendants from having the trial degenerate into a slaughter house of their reputations and secondly, whether any limits are to be placed on the prosecution in this age of dossierrs and computerization in attacking a criminal defendant's prior misconduct not amounting to a conviction.

To help answer these questions, the Court should clarify its ruling in *Walder v. U.S.*, 347 U.S. 62 (1954). In *Walder*, supra, this Court allowed the Government to offer rebuttal testimony of prior possession of narcotics despite its unlawful seizure, where the defendant had denied possession of

narcotics. The Court held it improper for the defendant to use as a shield the illegal seizure in order to insulate his false testimony. The issue in *Walder*, supra, was a very narrow one. There was no question of the defendant's prior possession of narcotics nor his guilt. However, if narcotics had been found in a house where several other persons lived, his possession and control of narcotics would be less definite and the inference of guilt even more obscure. It is doubtful whether the Court in *Walder*, supra, would have allowed the government to introduce this evidence if there was any doubt as to the defendant's guilt in possessing the narcotics.

In *Lee v. United States*, 368 F2 834 (1966), the Court of Appeals for the District of Columbia was faced with the problem of a defendant on trial for a narcotics violation who, on his direct examination, denied any knowledge of narcotics trafficking and on cross-examination further denied transactions on specified dates. In rebuttal, a Police officer testified about certain specified transactions by the defendant. It was the prosecutor's theory that this merely attacked the defendant's credibility and the Court so instructed the jury. The Court of Appeals in reversing the conviction held, Pages 836-837,

> "Whatever the reach of those decisions may be (*Walder v. U.S.*, 347 U.S. 62 and *Tate v. U.S.* 283 F2 377) they surely do not mean that one who has consistently denied any knowledge of a crime with which he has once been charged and who has been acquitted of it may, in a trial of a similar charge be impeached by testimony of his participation in such crime because he has once again denied any knowledge of it. It was the government here that chose to cross-examine the appellant about the two transactions for which he was not on trial. His denials on the witness stand did not contradict anything he had previously said. He had, thus, provided no occasion for his own impeachment; and it could have

been no other than highly prejudicial for the jury to hear the policeman's version of the September 26 and 27 incidents".

The Petitioners case is very similar to the *Lee case*, supra. The only significant distinction is that in *Lee*, supra, the defendant had been acquitted while in the instant case, the State had never brought the prior cases to trial.

The Court of Appeals for the 10th Circuit in *Coulston v. U.S.* 51 F2 178 (1931), the Court of Appeals for the 3rd Circuit in *U.S. v. Sweeney*, 262 F2 272 (1959), and the Court of Appeals for the 2nd Circuit in *U.S. v. Masino*, 275 F2 129 91960), and in *U.S. v. Glasser*, 443 F2 994 (1971), agree with the holding in the *Lee case*, supra. However, the Court of Appeals for the 8th Circuit in *Williams v. U.S.*, 216 F2 529 (1959) and the Court of Appeals for the 9th Circuit in *Ferrari v. U.S.*, 244 F2 132 (1957) appear to take the opposite approach. Further classification is needed on the issue by this Court.

In *Masino*, the defendant, who was charged with distributing heroin, denied on cross-examination that he had obtained heroin for two named persons. On rebuttal, the Government presented the two named persons as witnesses who testified as to the defendant's prior use and distribution of heroin to them. The Court held, page 133,

"It was prejudicial error for the Court to admit this rebuttal testimony since it went far beyond the permissible bounds of attacking a witness's credibility. When a witness is cross-examined for the purpose of destroying his credibility by proof of specific acts of misconduct not the subject of a conviction, the examiner must be content with the answer. The examiner may not, over objection, produce independent proof to show the falsity of the answer."

The rationale for this position was set forth in the *Sweeney case*, supra, where the Court of Appeals for the 3rd Circuit observed, page 277,

> "The purpose of the rule cutting off rebuttal testimony on this type of cross-examination is to avoid confusion of the issues or undue prejudice to the defendant."

Wigmore (Volume IIIA, Chadbourn Edition, 1970, Sections 979-983) also opposes the use particular acts of misconduct provable by rebuttal testimony.[2]

> "(E)ach additional witness introduces the entire group of questions as to his qualifications and his impeachment, and the amount of new evidence thus made possible may increase in far greater than geometrical proportion to the number of new witnesses so that the trial may become in length extremely protacted, and with relatively little profit; secondly, this additional mass of testimony on minor points tends to overwhelm the material issues of the case and to confuse the tribunal in its efforts to disentagle the truth upon those material points."

Wigmore's point is well illustrated in the instant case, where the State's case-in-chief covers 166 pages in transcript, while its rebuttal totals 108 pages.

In conclusion, the petitioners were denied a fair and impartial trial for the reasons set forth above. Although the rebuttal testimony involved the Petitioner Richard Carl Eberhardt, the conduct of the trial in denying him his rights, also clearly tainted the other two petitioners Jerry Eberhardt and Richard A. Ward and prejudiced them in the eyes of the jury because of their association with Hector's Restaurant.

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[2] p. 826

## CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Maryland Court of Appeals.

Respectfully submitted,

ROBERT N. DUGAN
Attorney for Petitioners.

## APPENDIX A

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UNREPORTED IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

NO. 166

September Term, 1972

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RICHARD CARL EBERHARDT
JERRY EBERHARDT
RICHARD A. WARD

(Three Appeals in One Record)

v.

STATE OF MARYLAND

Thompson
Gilbert
Scanlan,
JJ.

Per Curiam

Filed: November 20, 1972

On December 7, 1971, after a seven day trial, a jury in the Criminal Court of Baltimore, presided over by Judge David Ross, convicted Richard Carl Eberhardt (Richard) of pandering, Md. Ann. Code art. 27, §430, and operating a bawdyhouse, Md. Ann. Code art. 27, §15(a), Jerry Eberhardt (Jerry) of conspiring to violate the Maryland Alcoholic Beverage Laws, Md. Ann. Code art. 2B, §§3, 111 and 159, and Richard A. Ward (Ward) of occupying a disorderly house, Md. Ann. Code art. 27, §15(b). Judge Ross imposed consecutive sentences of ten years and one year, respectively, on Richard, two years on Jerry, and one year on Ward.

Appellants jointly attack the judgment of conviction by contending that the trial court erred (1) "in allowing, over objection, testimony of a prejudicial nature," (2) in permitting rebuttal testimony showing acts that allegedly occurred after the arrest in the instant case, (3) in allowing the introduction into evidence of Richard's prior criminal record, (4) in denying a motion based on insufficiency of the evidence to sustain the conviction, and (5) in refusing to continue "the motion for a new trial."

The facts are relatively simple. On May 5, 1971, Officer Clarence Webster went to Hector's Restaurant (Hector's) located at 621 Ensor Street in Baltimore City, for the purpose of obtaining information concerning the violation of various Maryland penal statutes. By prearrangement, Police Agent[1] Wallace Brenton, accompanied by a policewoman, was also at Hector's. Webster testified that he was approached by Geraldine Smith and was solicited by Victoria Rossi. Webster paid Rossi $35.00 in pre-recorded bills and he saw her hand the money to Richard. These bills were subsequently recovered from the cash register at Hector's. Shortly after the payment of the $35.00, and as the policewoman proceeded to open the door to allow uniformed policemen to enter the building, Jerry ran into the premises and yelled to Richard, "Dick, get rid of the whiskey. The cops are going to raid us." A number of bottles of various alcoholic beverages were then gathered up by Richard and thrown from the window of Hector's. Hector's did not have a license to sell alcoholic beverages. The food license and trader license were in the name of Ward.

The defense witnesses contradicted the testimony of the police officers. Additionally, Richard related to the jury that he was harassed by the police on numerous occasions. A

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[1]A police officer who has earned a college degree is styled "Police Agent."

portion of his testimony was to the effect that he was being penalized because of his refusal to allow the police to place undercover agents at Hector's. There was a flat denial that the marked money was ever given to Richard or that it was recovered from the cash register.

We shall discuss each of the appellants' contentions in the order in which they were posed to us, supplying such additional facts as may be necessary to dispose of the questions.

(1)

The appellants cite instances in which objections were overruled or motions for mistrial were denied. Of course, the granting of a motion for mistrial is a matter resting within the sound discretion of the trial court and should not be granted unless a plain and obvious reason exists. In *Hurley v. State*, 6 Md. App. 348, 251 A.2d 241 (1969), we said:

> " * * * [T]he trial court is not required to declare a mistrial for every inadvertent reply given by a witness or after every impermissive question asked by counsel."

See also *James v. State*, 14 Md. App. 689, 288 A.2d 644 (1972); *Killie v. State*, 14 Md. App. 465, 287 A.2d 310 (1972); *Estep v. State*, 14 Md. App. 53, 286 A.2d 187 (1972); *Baldwin v. State*, 5 Md. App. 22, 245 A.2d 98 (1968).

One instance of "prejudice" complained of by appellants occurred when a character witness for Richard was asked, on cross-examination, about his knowledge of Richard's prior convictions and arrests. Appellants argue that the inquiry into the witness's knowledge of Richard's past conduct was error, but we think that the interrogation complies with our holding in *Raimondi v. State*, 12 Md. App. 322, 278 A.2d 664

(1971), *aff'd*, 265 Md. 229, 288 A.2d 882 (1972), *cert. denied*, 12 CrL 4044. We said in *Raimondi*, at 336:

> " * * * [D]efendant tendered his reputation to the jury and thus condoned the introduction against him of damaging evidence that otherwise would not be admissible."

We do not deem the other instances cited by appellants to merit discussion. Suffice it to say that what the appellants obviously seek is a perfect trial, not merely a fair one. We have consistently held that an accused is entitled to a fair trial, not a perfect trial. *Lutvak v. United States*, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); *Shotkosky v. State*, 8 Md. App. 492, 261 A.2d 171 (1970).

Our review of the record fails to indicate any errors, individually or collectively, requiring a reversal of the judgments of conviction.

(2)

Appellants contend that the State's rebuttal testimony related to evidence that occurred in October and November, 1971, a period of five and six months after the arrest of May 5, 1971. The testimony, appellants aver, was improper rebuttal. The State, on the other hand, argues, as Judge Ross observed, that the appellants' defense was that Hector's was an "innocent milk-bar, nighttime restaurant with no criminal conduct before or after [May 5, 1971], and no reason for intervention by the authorities." We think that the appellants, having raised at the trial the issue of the reputation of the restaurant, cannot now complain that the State, in rebuttal testimony, offered evidence to contradict that claim. Judge Ross properly instructed the jury that it could consider the rebuttal testimony, but not as substantive evidence of the crimes charged against the appellants in the instant case. *Williams v. State*, 15 Md. App. 320, 290 A.2d 542 (1972).

The cases relied upon by the appellants to support their contention are inapposite. In the instant case, the appellants literally opened the door to the State's rebuttal when Richard testified about the police harassment, both before and after the raid of May 5, 1971, to which the appellants had been subjected. Under these circumstances, the rebuttal testimony was not directed toward a collateral issue, *Williams v. State, supra,* and was not improper.

(3)

During the course of cross-examination of the appellant Richard, he was asked:

> [Assistant State's Attorney]
>
> "Q. Now, in 1952 you were convicted, weren't you, in California, of violation of Section 470 of their penal code?[2] A. I don't know what's it for.
>
> Q. I don't know, but were you convicted in 1952 in California? A. I don't recall.
>
> Q. You don't recall?
>
> [Defense counsel] I object to the question, and move it be stricken, and the answer stricken."

Judge Ross overruled the objection and declined to strike. Richard now argues that the interrogation regarding the 1952 conviction was violative of the Supreme Court's mandate in *Burgett v. Texas,* 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319

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[2]California Penal Code §470 embraces, *inter alia,* bogus check passing.

(1967), wherein Mr. Justice Douglas, speaking for the majority of the Court, held:

> "The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon v. Wainwright* [372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)] is inherently prejudicial and we are unable to say that instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman v. California*, 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705 (1967)."

Judge Orth (now Chief Judge) for this Court, in *Johnson v. State*, 9 Md. App. 166, 263 A.2d 232 (1970), noted:

> "We do not construe this language [of *Burgett*] to mean that the error is *per se* prejudicial so as to require reversal; [the Supreme Court] apparently applied the *Chapman* test in *Burgett* and were unable to say on the facts before it that the error was harmless * * *. It did not foreclose the possibility, as we see it, that in a proper factual situation such error could be found to be harmless. * * * For example, that there were a number of prior convictions properly admitted, * * * would be of probative value in determining whether the admissions of invalid convictions were harmless." (Footnote omitted).

Even if we were persuaded that the State's use of the 1952 California offense constituted a violation of *Burgett*, we would, nevertheless, under the facts of this case, deem that violation to be "harmless error beyond a reasonable doubt," for the reasons hereinafter set forth.

The fact that Richard had a criminal record was originally introduced into evidence during the direct examination of Richard when he testified that in 1961 he had been convicted

of conspiracy to commit robbery, and that in 1969 he was fined $300.00 for maintaining a disorderly house. On cross-examination, following a question which dealt with whether or not the appellant Richard had been convicted of statutory rape in the State of Pennsylvania, to which the response was "no," a hearing out of the presence of the jury was held in order to establish whether *vel non* the admission into evidence of the conviction that had been suffered by appellant was properly allowable under *Burgett. Cleveland v. State*, 12 Md. App. 712, 280 A.2d 520 (1971); *Johnson v. State, supra.* At the hearing, the appellant Richard testified that he had been convicted in 1953 of statutory rape and that he sustained a juvenile conviction in California for bad checks. It is obvious that the 1952 offense which the State alluded to in its cross examination during the jury's presence was the same "bad check" charge to which appellant admitted out of the presence of the jury. Appellant Richard denied that he had an attorney at the juvenile hearing in California, although he admitted having attorneys represent him in the other matters. When the jury was returned, Richard then testified, in their presence, concerning his conviction for statutory rape, as well as answering a question about the 1961 conviction.

We observe that in *Burgett*, over objection, the indictment, alleging four prior convictions, was read to the jury. One of these convictions was found void on its face by the Texas court, one was found by the Supreme Court to be in violation of *Gideon v. Wainwright, supra*, and no evidence was offered as to the other two alleged convictions. The void conviction was ordered stricken during the absence of the jury. The conviction which was subsequently found violative of *Gideon* was admitted into evidence. The first time that the jury was informed that they should not consider Burgett's prior convictions was when they were so instructed by the trial judge during his charge to the jury. The Supreme Court held that the jury's knowledge of the prior convictions had so adversely affected Burgett's right to a fair and impartial trial

that the instructions could not be deemed as curative nor the error harmless.

In the instant case, we are confronted with an entirely different factual situation. Richard testified in the presence of the jury as to three of his prior convictions, all of which complied with *Burgett* and *Gideon*. In view of the fact that the interrogation relative to the juvenile matter was neither admitted nor denied by Richard, and that there was an admission in the presence of the jury of the other specified convictions, we are unpersuaded that the testimony surrounding the juvenile offense is anything more than harmless. *Johnson v. State, supra.*

(4)

Appellants strenuously argue that the evidence was not sufficient to sustain the conviction. They rely upon *Vincent v. State*, 220 Md. 232, 151 A.2d 898 (1959); *Nichols v. State*, 5 Md. App. 340, 247 A.2d 722 (1968), wherein it is stated that when guilt is based solely on circumstantial evidence, the circumstances taken together must be consistent with or such as to exclude every reasonable hypothesis or theory of innocence. Appellants' reliance on *Vincent* and *Nichols* is misplaced. In *Metz v. State*, 9 Md. App. 15, 262 A.2d 331 (1970), we said:

> " * * * [t]he test for the sufficiency is the same whether the evidence be direct, circumstantial, or provided by rational inferences therefrom."

We further stated:

> "We think that the test as to the sufficiency of evidence may be stated as follows:
>
> > 'To be sufficient in law to justify a conviction, the admissible evidence adduced

> must show directly, or circumstantially, or support a rational inference of, the facts to be proved from which the trier of fact could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged.' "

In short, *Metz* explained the holding of *Vincent* and *Nichols*. See, *inter alia*, *Carter v. State*, 15 Md. App. 242, 289 A.2d 837 (1972); *Conway v. State*, 15 Md. App. 198, 289 A.2d 862 (1972); *Young v. State*, 14 Md. App. 538, 288 A.2d 198 (1972); *King v. State*, 14 Md. App. 385, 287 A.2d 52 (1972); *Graham v. State*, 13 Md. App. 171, 282 A.2d 162 (1971); *Hunt v. State*, 12 Md. App. 286, 278 A.2d 637 (1971); *Streat v. State*, 11 Md. App. 543, 275 A.2d 537 (1971); *Ott v. State*, 11 Md. App. 259, 273 A.2d 630 (1971); *Coward v. State*, 10 Md. App. 127, 268 A.2d 508 (1970).

We shall now discuss what the evidence revealed as to each appellant.

*Richard:* The testimony in the instant case in regard to the pandering charge against Richard established that there was a solicitation made in Hector's Restaurant by a prostitute. The sum of $35.00 in pre-recorded bills was collected by the prostitute and paid over to Richard. The $35.00 was placed by Richard in the cash register from which it was subsequently recovered during the raid. This testimony, if believed, demonstrates a violation of Md. Ann. Code art. 27, §430, which provides:

> "Any person or persons who knowingly receive any money or other valuable thing 'without lawful, actual bona fide consideration' from the earnings of any woman or girl engaged in prostitution shall be guilty of a felony, and upon conviction thereof shall be sentenced to the penitentiary for not less than three nor more than ten years.' "

The evidence of the receipt of the money from the prostitute,

under the circumstances in the instant case, was sufficient to sustain the conviction of pandering.

The second charge of which Richard was convicted was a violation of Md. Ann. Code art. 27, §15(a). It provides:

> "It shall be unlawful:
>
> (a) To keep, set up, maintain or operate any place, structure, building or conveyance for the purpose of prostituion, lewdness or assignation."

That Richard was one of the operators of the restaurant, and that he apparently allowed the solicitation for the purpose of prostituion to occur on the premises, are sufficient to sustain the conviction under this charge.

*Jerry:* The evidence as to Jerry showing violations of Md. Ann. Code art. 2B, §§3, 111 and 159 was that Jerry, along with Richard, was one of the actual operators of Hector's; that alcoholic beverages were on the premises and were from time to time sold, notwithstanding the fact that Hector's did not have a liquor license. Additionally, Jerry was the one who alerted Richard that the place was to be raided, so that the alcoholic beverages could be thrown from the window of the premises for the purpose of avoiding detection.

Md. Ann. Code art. 2B, §3 provides in pertinent part:

> "(a) *General provisions and prohibitations.* – (1) Alcoholic Beverages Generally. No alcoholic beverages shall be bought, possessed, stored, imported, transported, kept or suffered to be bought, possessed, stored, imported, transported or kept in any vehicle, vessel or aircraft or on any premises or under his charge or control by any person except:
>
> * * * * * * *

(ii) By a licensee as provided in this article * * *.

* * * * * * *

(3) Sales. It shall be unlawful for any person to sell, or suffer to be sold, or for the purpose of sale to * * *, possess, * * * any alcoholic beverages unless otherwise provided for in this article."

The indictment charged that Jerry "unlawfully did conspire with Richard Carl Eberhardt and certain other persons * * * to keep, store, conceal, distribute and/or sell alcoholic beverages * * *." We think that the facts, as presented to the jury, gave rise to a rational inference that Jerry did conspire with Richard to keep, store and sell alcoholic beverages in and upon the premises known as Hector's.

*Ward:* Md. Ann. Code art. 27, §15 provides:

"It shall be unlawful:

* * * * * * *

(b) To occupy any place, structure, building or conveyance for the purpose of prostitution, lewdness or assignation, or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution, lewdness or assignation with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose."

Richard testified that Ward had not been on the premises for a period in excess of three months prior to the time of the raid. However, another defense witness testified that Ward was on the premises "once a week" and shortly before May 5, 1971. It was established that the trader's license and business

license were in the name of Ward. Consequently, the premises, insofar as the carrying on of a business was concerned, was under Ward's control. It was further established that the premises was used "for the purpose of prostitution, lewdness or assignation" and we think the jury was justified, under the evidence, in believing that Ward either knew or had "reasonable cause to know" that the premises was being used for such purpose.

(5)

Lastly, appellants argue that the trial court abused its discretion when it refused to allow a continuance of the hearing on the motion for a new trial.

At the hearing, the appellants, through their counsel, alleged that a police officer (not otherwise identified) had contacted the appellants and advised them that he, the officer, had been approached by the Assistant State's Attorney and had been requested to give perjured testimony at the trial. We glean from the record that the alleged perjured testimony was not, however, given at the trial. The information from the officer was supposedly conveyed to the appellants on December 8, 1971, the day following the trial. The appellants apparently did not advise their counsel of the receipt of the information until the date of the hearing on the motion for the new trial, i.e., December 20, 1971. Judge Ross concluded that the information that appellants desired to place in the record concerning the alleged solicitation for perjured testimony was not pertinent to the guilt or innocence of the appellants because there was no showing that perjured testimony was knowingly offered by the State, and, further, in view of the appellants' prior knowledge of the allegation and the fact that the matter was first raised midway through the hearing on the motion for a new trial, it was neither timely nor relevant. The trial judge directed that the entire matter be referred to the State's Attorney for Baltimore City for investigation, but refused the continuance.

Appellants rely upon *Boone v. State*, 2 Md. App. 80, 233 A.2d 476 (1967) and *Clark v. State*, 6 Md. App. 91, 250 A.2d 317 (1969). Both are inapposite. In *Boone*, we quoted from *Jackson v. State*, 214 Md. 454 (1957), *cert. denied* 356 U.S. 940, wherein it is said:

> " * * *[O]rdinarily matters of continuance are within the sound discretion of the trial judges; and their rulings thereon should not be disturbed, unless there be a showing that there was an abuse of this discretion, which was prejudicial to the party requesting the continuance. To show such an abuse of discretion and prejudice for failure to continue a case because of the absence of witnesses, the party requesting the continuance should show: that he had a reasonable expectation of securing the evidence of the absent witness or witnesses within some reasonable time; that the evidence was competent and material; and he believed that the case could not be fairly tried without it; and that he had made diligent and proper efforts to secure the evidence." (Citations omitted).

Here, there was no showing of the competency or materiality of the evidence to be given by the absent witness – the police officer. The case had already been fairly tried and there certainly was, on the part of the appellants, an almost total lack of diligence in making the alleged information known to defense counsel. *Clark* is to the same effect as *Boone*. At best, the appellants' allegation relating to the attempted solicitation of perjured testimony was not competent or relative within the meaning of *Jackson*, *Boone* and *Clark* in the absence of a representation that perjured testimony had been knowingly

used by the State in the presentation of their case. No such representation was made in the instant case. We find no abuse of discretion by Judge Ross.

JUDGMENTS AFFIRMED.
ONE-THIRD COSTS TO BE PAID BY RICHARD CARL EBERHARDT;
ONE-THIRD COSTS TO BE PAID BY JERRY EBERHARDT; APPELLANT WARD WAS ALLOWED TO PROSECUTE HIS APPEAL AS AN INDIGENT.

## APPENDIX B

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| RICHARD CARL EBERHARDT; et al | IN THE COURT OF APPEALS of MARYLAND |
| v. | Miscellaneous Docket No. 267 (Criminal) |
| STATE OF MARYLAND | September Term, 1972 (No. 166, September Term, 1972 Court of Special Appeals) |

### ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge

Date: February 5, 1973.